82-1071

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents,

and

PETER JOHNSON, as Administrator of the Bonneville Power Administration, Department of Energy, and JAMES EDWARDS, as Secretary of the Department of Energy, and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

This is the first case to arise under the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) ("Act"), a unique regional power planning statute that significantly altered the traditional distribution of rights to federal power accorded public and private customers of the Bonneville Power Administration ("BPA"). Jurisdiction to review final agency action under the Act is vested exclusively in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), 16 U.S.C. § 839f(e)(5), thus precluding consideration of the question here presented by other Courts of Appeal.[1] It therefore appears that this petition presents the first and only opportunity for review of the following question:

> Did the Ninth Circuit, in determining that BPA "unreasonably" interpreted its statutory mandate to supply federal power to nonpreference industrial customers, contravene established principles of judicial review and improperly burden Congress's plenary authority to prescribe the scope and application of statutory preference rules?

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[1] Because of this exclusive review provision, no actual conflict can arise among the Circuit Courts of Appeal in interpreting the Act's provisions. However, as argued herein, the Ninth Circuit's decision interpreting the meaning and application of preference rules under the Act conflicts in principle with the decision of the Sixth Circuit in *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F.Supp. 22 (E.D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir. 1956), interpreting the meaning and application of preference rules under the analogous Tennessee Valley Authority Act, 16 U.S.C. §§ 831-831dd (1933).

LIST OF PARTIES AFFECTED

Petitioners Aluminum Company of America, Georgia-Pacific Corporation, Pennwalt Corporation, Reynolds Metals Company, Intalco Aluminum Corporation, Crown Zellerbach Corporation, Hanna Nickel Smelting Company, Alumax Pacific Corporation, Kennecott Corporation, ARCO Metals Company, Kaiser Aluminum & Chemical Corporation, Pacific Carbide & Alloys Company, Oregon Metallurgical Corporation, and Martin-Marietta Aluminnum Company are direct service industrial customers ("DSIs") of the Bonneville Power Administration.[2] Petitioners DSIs appeared as Respondents-Intervenors before the Ninth Circuit.

Respondents Public Utility District No. 1 of Chelan County, Public Utility District No. 1 of Cowlitz County, Public Utility District No. 1 of Douglas County, Public Utility District No. 1 of Snohomish County, Public Utility District No. 2 of Grant County, City of Seattle, City Light Department, and City of Tacoma, Department of Public Utilities are municipal corporations organized and existing under the laws of the State of Washington. Respondents Central Lincoln Peoples' Utility District, Clatskanie Peoples' Utility District, Northern Wasco County Peoples' Utility District, and Tillamook Peoples' Utility District are public corporations organized and existing under the laws of the State of Oregon. Respondent Eugene Water & Electric Board is a part of the City of Eugene, a municipal corporation organized and existing under the laws of the State of Oregon. Respondents public utilities appeared as Petitioners before the Ninth Circuit. Respondent Public Power Council is a non-profit corporation organized and existing under the laws of the State of Washington, consisting of over one hundred publicly-owned and consumer-

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[2] Pursuant to Rule 28.1 of this Court's Rules, Petitioners' parents, subsidiaries (except wholly owned subsidiaries), and affiliates are listed in Appendix R.

owned electric utilities. Respondent Public Power Council appeared as a Petitioner-Intervenor before the Ninth Circuit.

Respondents Portland General Electric Company, CP National Corporation, Pacific Power & Light Company, Puget Sound Power and Light Company, Montana Power Company, and Idaho Power Company are investor-owned utilities ("IOUs") who buy power from BPA for resale to consumers in the Pacific Northwest. Respondents IOUs intervened below and were aligned by the Ninth Circuit as Petitioners-Intervenors. However, their position on the merits before the Ninth Circuit was contrary to the position of the publicly-owned utilities.

Respondent Peter Johnson is the Administrator of the Bonneville Power Administration, a federal agency within the Department of Energy. Respondent James Edwards was the Secretary of the Department of Energy, an agency of the United States. Federal Respondents appeared as Respondents before the Ninth Circuit and, as is apparent from the briefs and the Opinion below, were aligned on the merits with the DSIs. These federal parties have been styled Respondents herein because it is uncertain at the time of filing whether they intend to petition for certiorari.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties Affected	ii
Jurisdictional Statement	1
Opinion Below	1
Statutory Provisions Involved	1
Introduction	4
Statement of the Case	7
Reasons for Granting the Writ	13
The Decision Below Violates Established Principles of Judicial Review and Directly Contravenes Congress's Statutory Plan for Allocating Federal Power to Nonpreference Customers	13
1. In Misapplying Preference Rules Under the Act the Opinion Subjects BPA's Statutory Interpretation to a Heightened and Improper Standard of Review	13
2. The Opinion Overturns Congress's Plan Which Allocates Power to Nonpreference Industrial Customers While Reaffirming Preference Customer Rights to All Unallocated Power	18
3. The Opinion Directly Impairs BPA's Ability to Secure the Reserve/Revenue Advantages of Industrial Customer Service Intended by Congress	27
Conclusion	30
Appendix A—Opinion and Judgement of the Ninth Circuit	A-1

(The following Appendices bound in a separate volume)

Appendix B	Pacific Northwest Electric Power Planning and Conservation Act	B-1
Appendix C	125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield)	C-1
Appendix D	House Commerce Report, H.R. Rep. No. 967 (I), 96th Cong. 2d Sess. (1980)	D-1
Appendix E	House Interior Report, H.R. Rep. No. 967 (II), 96th Cong. 2d Sess. (1980) ..	E-1
Appendix F	Senate Report, S. Rep. No. 272, 96th Cong., 1st Sess. (1979)	F-1
Appendix G	125 Cong. Rec. H 9848-49, H 9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell and Rep. Foley)	G-1
Appendix H	DSI Contract (1981) Sections 7(c), 7(d), 14	H-1
Appendix I	Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug. 19, 1980) ..	I-1
Appendix J	126 Cong. Rec. S 14691, S 14698 (daily ed. Nov. 19, 1980) (remarks of Sen. Jackson and Sen. McClure)	J-1
Appendix K	Memorandum regarding "BPA Obligations With Respect to DSI Top Quartile" (Feb. 12, 1981)	K-1
Appendix L	126 Cong. Rec. H 10678 (daily ed. Nov. 17, 1980) (remarks of Rep. Foley)	L-1

Appendix M	Cover Letter by BPA Administrator Offering New DSI Contract (Aug. 27, 1981)	M-1
Appendix N	DSI Contract (1975) Sections 4, 7, General Contract Provisions, Section 8(b)	N-1
Appendix O	Statement of Jack A. Speer before House Subcomm. on Water and Power Resources	O-1
Appendix P	Bonneville Power Administration, U.S. Dept. of the Interior, *Draft Environmental Statement* (DES-77-21) II-71 (July 22, 1977)	P-1
Appendix Q	Pub. L. 87-701 § 112(e) (Sept. 26, 1962) 76 Stat. 604	Q-1
Appendix R	List of DSI Parents, Subsidiaries, and Affiliates	R-1

TABLE OF AUTHORITIES CITED

Cases

Page

Anaheim v. Duncan, 658 F.2d 1326 (9th Cir. 1982) 16

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CBS, Inc. v. Federal Communications Commission, 453 U.S. 367 (1981) 14

Clifford F. MacEvoy Co. v. United States, 322 U.S. 102 (1944) 27

Columbia Basin Land Production Association v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) 14

Power Development Reactor Co. v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396 (1961) 14

Santa Clara v. Andrus, 572 F.2d 660 (9th Cir. 1978) *cert. denied sub nom.* Pacific Gas & Electric Co. v. Santa Clara, 439 U.S. 859 (1978) 16, 22

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975) *on remand sub nom.* Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 516 F.2d 488 (5th Cir. 1975) 14

Udall v. Tallman, 380 U.S. 1 (1965) 14

Unemployment Compensation Commission v. Aragon, 329 U.S. 143 (1946) 14

United States v. Rutherford, 422 U.S. 544 (1979) 14

Volunteer Electric Cooperative v. Tennessee Valley Authority, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir. 1956) ..... i, 17, 30

Zuber v. Allen, 396 U.S. 168 (1969) 14

TABLE OF AUTHORITIES CITED

Statutes

Page

Bonneville Project Act of 1937, 16 U.S.C. Section 832-832l 2,7

Hungry Horse Dam Act, 43 U.S.C. Sections 593a-593b 16

Niagara Power Project Act, 16 U.S.C. Sections 836-836a 16

Pacific Northwest Electric Power Planning and Conservation Act ("Regional Act"): ..... i, 1

Section 3(17) [16 U.S.C. § 839a(17)] 12, 14, 19, 26

Section 5 [16 U.S.C. § 839c] 19

Section 5(a) [16 U.S.C. § 839c(a)] 2, 10, 15, 18, 19, 23

Section 5(b) [16 U.S.C. § 839c(b)] 21, 24

Section 5(b)(1) [16 U.S.C. § 839c(b)(1)] 21, 24

Section 5(b)(1)(A) [16 U.S.C. § 839c(b)(1)(A)] 2

Section 5(c) [16 U.S.C. § 839c(c)] 21

Section 5(d) [16 U.S.C. § 839c(d)] 19, 21

Section 5(d)(1)(A) [16 U.S.C. § 839c(d)(1)(A)] 2, 10, 12, 14, 19, 20, 21, 24, 25, 26

Section 5(d)(1)(B) [16 U.S.C. § 839c(d)(1)(B)] 2, 12, 19, 20, 21, 24, 25, 27

Section 5(f) [16 U.S.C. § 839c(f)] 3, 15, 21, 26

Section 5(g) [16 U.S.C. § 839c(g)] 23, 24

Section 5(g)(1)(A)-(D) [16 U.S.C. § 839c(g)(1)(A)-(D)] 3, 9

Section 5(g)(7) [16 U.S.C. § 839c(g)(7)] 3, 9, 19, 21, 22, 23, 24, 25

Section 6 [16 U.S.C. § 839d] 10, 22

Section 6(a)(2)(A) [16 U.S.C. § 839d(a)(2)(A)] 3

Section 9(e)(5) [16 U.S.C. § 839f(e)(5)] i

Section 10(c) [16 U.S.C. § 839g(c)] 3, 4, 10, 15, 18, 19, 23

Section 10(f) [16 U.S.C. § 839g(f)] 16

TABLE OF AUTHORITIES CITED

STATUTES

	Page
Tennessee Valley Authority Act, 16 U.S.C. Sections 831-832dd	i
16 U.S.C. Sections 837-837h	16
28 U.S.C. Section 1254(1)	1
Pub. L. 87-701, § 112e, 76 Stat. 604	16

Legislative History

House Committee on Interstate and Foreign Commerce, Pacific Northwest Electric Power Planning and Conservation Act, H. R. Rep. No. 976(I), 96th Cong., 2d Sess., *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 5989, *and in* U.S. Dept. of Energy, *Legislative History of the Pacific Northwest Electric Power and Conservation Act* 333 (Bonneville Power Administration Library, 1981) 7, 8, 9, 11, 15, 23, 26, 27

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TABLE OF AUTHORITIES CITED
LEGISLATIVE HISTORY

Page

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126 Cong. Rec. H 10678 (daily ed. Nov. 17, 1980), *reprinted in* U.S. Dept. of Energy, *Legislative History of the Pacific Northwest Electric Power and Conservation Act* 134 (Bonneville Power Administration Library, 1981) (remarks of Rep. Foley 22

Bonneville Power Administration, U.S. Dept. of the Interior, *Draft Environmental Statement* (DES-77-21) II-71 (July 22, 1977) 24

Cover Letter by BPA Administrator Offering New DSI Contract (Aug. 27, 1981) 23, 24

DSI Contract (1975) Sections 4, 7, General Contract Provisions Section 8(b) XXIII Contract Official Record 6276, 6278-79, 6283, 6285-86, 6305, 6310-12 ..... 12, 19, 24, 25

TABLE OF AUTHORITIES CITED
LEGISLATIVE HISTORY

Page

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Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug. 19, 1980), VIII Contract Official Record 2334-2351 ..... 15, 21, 28

Memorandum regarding "BPA Obligations With Respect to DSI Top Quartile" (Feb. 12, 1981) XXV Contract official Record 6748-50 ..... 15, 28

Statement of Jack A. Speer before House Subcomm. on Water and Power Resources 20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Aluminum Company of America, *et al.*, ("Petitioners") respectfully pray that a writ of certiorari issue to review the judgment and Opinion ("Opinion") of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

JURISDICTION

The Ninth Circuit's Opinion was rendered on April 6, 1982 and thereafter amended by Order dated September 7, 1982. A timely petition for rehearing *en banc* was denied on September 27, 1982, and this petition for certiorari was filed thereafter within 90 days. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The Ninth Circuit's Opinion as amended, reported at 686 F.2d 708, appears in Appendix A attached to this Petition.

STATUTORY PROVISIONS INVOLVED

The principal provisions of the Pacific Northwest Electric Power Planning and Conservation Act ("Act"), Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) [Appendix B], bearing upon the administrative actions here at issue are as follows:

DEFINITIONS

SEC. 3. As used in this Act, the term—

> (17) "Reserves" means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers . . . and available . . . (B) from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers.

[16 U.S.C. § 839a(17)]

SALE OF POWER

SEC. 5.

(a) All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937. . . . (16 U.S.C. 832-832l)

[16 U.S.C. § 839c(a)]

(b)(1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 and to each requesting investor-owned utility *electric power to meet the firm power load* of such public body, cooperative or investor-owned utility in the Region *to the extent that such firm power load exceeds—*

(A) *the capability of such entity's firm peaking and energy resources used . . . to serve its firm load in the region* . . . . (Emphasis supplied.)

[16 U.S.C. § 839c(b)(1)(A)]

• • •

(d)(1)(A) The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. *Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.* (Emphasis supplied.)

(d)(1)(B) . . . [T]he Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of "industrial firm power."

[16 U.S.C. § 839c(d)(1)(A)-(B)]

• • •

(f) The Administrator is authorized to sell, or otherwise dispose of, electric power . . . *that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section* in accordance with this Act and other Acts applicable to the Administrator. . . . (Emphasis supplied.)

[16 U.S.C. § 839c(f)]

(g)(1) As soon as practicable within nine months after December 5, 1980, the Administrator shall commence necessary negotiations for, and offer, initial long-term contracts . . . simultaneously to—

(A) existing public body and cooperative customers and investor-owned utility customers . . . ;

(B) Federal agency customers . . . ;

(C) electric utility customers . . .; and

(D) direct service industrial customers. . . .

[16 U.S.C. § 839c(g)(1)(A)-(D)]

• • •

(g)(7) *The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A) through (D).* (Emphasis supplied.)

[16 U.S.C. § 839c(g)(7)]

CONSERVATION AND RESOURCE ACQUISITION

SEC. 6.

• • •

(a)(2) . . . The Administrator shall acquire, in accordance with this section, sufficient resources—

(A) to meet his contractual obligations . . . .

[16 U.S.C. § 839d(a)(2)(A)]

SAVINGS PROVISION

SEC. 10.

(c) Nothing in this chapter shall alter, diminish, abridge, or otherwise affect the provisions of other

Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

[16 U.S.C. § 839g(c)]

INTRODUCTION

This is the first case to arise under a comprehensive new statute described by its Congressional sponsors as "without any doubt . . . the most important bill ever to have affected the Pacific Northwest."[3] It concerns the scope of Congress's authority to prescribe the terms under which federal power will be sold to publicly-owned utilities and cooperatives ("preference customers"), and privately-owned utilities, federal agencies, and industrial customers ("nonpreference customers").

Although regional in application, the Act is of national significance because for the first time Congress has created statutory entitlements to federal power for individual nonpreference customers. While plainly representing a departure from Congress's 70-year tradition of delegating to administrative agencies responsibility for the allocation of all federal power and according to publicly-owned utilities and cooperatives "preference and priority" in such administrative allocation, this departure was deemed necessary in order to assure the provision of low-cost regional operating reserves, to make possible significant rate relief for residential and small farm consumers, and to forestall an anticipated struggle over scarce federal power supplies. At the same time, Congress carefully limited the duration of such nonpreference entitlements and retained preference rules to govern administrative allocation of federal power to which rights had not been specifically assigned by statute.

The Ninth Circuit's Opinion shatters this Congressional plan. By striking contract provisions designed to assure

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[3] 125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Appendix C].

power for industrial customers, and requiring instead that BPA sell a portion of this power to certain publicly-owned utilities whose regional requirements Congress already had met, the Opinion directly impairs BPA's ability to achieve these statutory goals and maximize efficient operation of the federal power system. It does so in stated reliance upon a preference tradition that was altered by the Act in order to assure BPA's service of these very industrial customer loads.

Indeed, the Ninth Circuit's Opinion so directly overturns Congress's express distribution of preference and nonpreference power entitlements that it suggests a fundamental assault upon the exercise of legislative discretion in allocating federal resources. In holding BPA's statutory interpretation "unreasonable" while acknowledging its support in the legislative history, 686 F.2d 708, 713-14 & n.6, the Opinion subjects that interpretation to heightened scrutiny —a standard of review normally reserved for the vindication of fundamental Constitutional rights. The Opinion can be understood only as proceeding from the assumption that preference rules once articulated become presumptively immune from statutory revision unless so declared by "explicit" Congressional exception. Judicial creation of such a presumption—and corresponding elevation of preference to a quasi-Constitutional interest—plainly misconceives the statutory origin of all preference rules and ignores several previous instances in which Congress has reserved power for nonpreference customers even while expressly reaffirming statutory preference rights.

Although preference provisions may be found in numerous federal statutes and are of great significance in the distribution of federal power, this Court has never before considered the nature and operation of preference rules. That consideration is now urgent. Properly understood, preference is simply a statutory mechanism used by Congress to govern federal agencies in the allocation of uncommitted power when that power is insufficient to sat-

isfy both preference and nonpreference customers. The preference mechanism, once established, has never been viewed as an overriding principle of entitlement immune from statutory revision; Congress is entirely free to allocate certain power directly to nonpreference customers, while retaining preference rules to govern administrative allocation of all remaining uncommitted power. That is precisely the scheme intended by Congress under the Act. If the Opinion is allowed to stand, Congress's plenary authority to allocate power among public and private customers in responding to changing power supply conditions will be improperly and dangerously burdened.

It would be difficult to overstate the significance of the Ninth Circuit's Opinion. Beyond the threatened loss to BPA of operating efficiencies, revenues, and the massive rate subsidy intended for residential and farm consumers throughout the region,[4] the Opinion affects nearly a quarter of the power supplied to industries which produce in the Northwest a third of the nation's primary aluminum and large quantities of other strategic metals and chemicals vital to the national defense and domestic economy. Under the Opinion, a portion of the power needed by these industries in order to continue operations is subject to claim at any time by a small group of preference utilities who already are guaranteed sufficient power for their own consumers, and who will simply resell this "extra" power at a higher price to other buyers. The Opinion thus jeopardizes the survival of industries whose continued regional operation Congress expressly sought to assure in the Act, as well as the jobs, revenues, and goods these industries produce.

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[4]For service this year under the contracts at issue, BPA proposes to charge its industrial customers nearly $600,000,000. Of this amount, nearly $200,000,000 will be used to provide rate relief for Northwest residential and small farm consumers, who are served by nonpreference investor-owned utilities also allocated power by Congress under the Act.

In sum, by disregarding established principles of judicial review and by subverting Congress's formulation of preference and nonpreference rights under the Act, the Opinion unravels four years of legislative effort and imposes potentially devastating consequences for Pacific Northwest power service.

STATEMENT OF THE CASE

Pursuant to the Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l, and subsequent legislation, BPA for over 40 years has marketed federal power generated from the Columbia River System ("System") to publicly and privately owned utilities, federal agencies, and direct service industries ("DSIs") in the Pacific Northwest. Through the early 1970's the System produced sufficient power for all BPA customers. The region's supply was augmented by certain utilities ("generating utilities"), which built and operated their own power generating facilities and thus needed to purchase from BPA only part of the power required for their consumers.

As demand steadily increased, however, and the System's finite generating potential reached its limits, significant regional power shortages were forecast. Since BPA lacked authority to acquire additional power, it was constrained by statutory preference rules to eliminate sales to nonpreference customers as their existing contracts expired, and prepare a program for administrative allocation of its fixed power supplies. Given the cost differential between low-priced federal power and expensive alternatives, potential claimants began vigorous efforts to secure the largest possible share of this allocation. The prospect of a "regional civil war" threatened complete disruption of the System. *See, e.g.*, House Committee on Interstate and Foreign Commerce, Report ("House Commerce Report"), *H.R. Rep. 976 (I)*, 96th Cong., 2d Sess. 23-27 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 5989-93 *and in* U.S. Department of Energy, *Legislative History of the Pacific Northwest Electric Power and Conservation Act*

355-59 (Bonneville Power Administration Library, 1981) [Appendix D, at D60-D66]; House Committee on Interior and Insular Affairs, Report ("House Interior Report"), *H.R. Rep. No. 976 (II)*, 96th Cong., 2d Sess. 26-32 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 6023-30 *and in* U.S. Dept. of Energy, *Legislative History of the Pacific Northwest Electric Power and Conservation Act* 268-274 (Bonneville Power Administration Library, 1981) [Appendix E, at E68-E78]; Senate Committee on Energy and Natural Resources, Report ("Senate Report"), *S. Rep. No. 272*, 96th Cong., 1st Sess. 17-18 (1979), *reprinted in* U.S. Department of Energy, *Legislative History of the Pacific Northwest Electric Power and Conservation Act* 461-62 (Bonneville Power Administration Library, 1981) [Appendix F, at F37-F40].

Faced with this situation, Congress intervened and allocated power to preference and nonpreference customers by statute, "specifying directly how much power each class of BPA customer is to receive, and at what cost." 126 Cong. Rec. H 9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) [Appendix G].[8] Under the Act, BPA for the

[8]The need for direct Congressional intervention was understood and expressly recognized. As explained in the *House Commerce Report*, at 31, 36-37 [Appendix D, at D72, D80-D82]:

> Half of the power in the Northwest is relatively low-cost Federal power. All of that power is presently committed by contracts that begin expiring in 1981, and Bonneville lacks the authority to add significantly to supplies. Thus, allocation of Federal power cannot be avoided; the only issue is whether the reallocation will be legislated by Congress or performed administratively by the Administrator of BPA. An administrative allocation will be fought over for years in the courts because the amount of Federal power is sufficiently large and its cost is sufficiently low that none of the utilities or the industries served directly by BPA can afford not to take part in the impending courtroom battles. Without a legislative allocation of Federal power, disruption in the region is virtually inevitable.
>
> • • •
>
> BPA, in a May 20, 1979, document outlining issues relative to this legislation, said:

first time was directed to supply power to nonpreference utility and industrial customers under 20-year contracts, *see* Section 5(g)(1), which contracts specifically were exempted from preference customer challenge, *see* Section 5(g)(7). Congress retained existing preference rules to

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> Under the preference clause, this fixed quantity of BPA power must eventually be offered solely to the public bodies and cooperatives, since the projected needs of these preference customers will in future years exceed the total BPA supply. Given its limited power supply, BPA cannot execute new firm power sales contracts with nonpreference customers such as investor-owned utilities (IOU's) and direct service industries (DSI's) as proposed in the legislation. These facts have set the stage for an imminent and protracted legal battle within the Northwest over the meaning and application of the preference clause, the formation of new preference utilities or other entities claiming preference status, and the fate of the DSI's and the vital power reserves that BPA's contracts with the DSI's provide for the region.
>
> • • •
>
> The proposed allocation system can be carried out only through new contracts between BPA on the one hand and preference customers, IOU's and DSI's on the other. But under the present law, BPA cannot execute such contracts. The fixed supply of BPA power is too small to meet even the full future requirements of preference customers in the future, and therefore contracts with the nonpreference IOU's and DSI's are legally precluded. This is true even though the total supply of Federal plus non-Federal power in the region is, and can remain, sufficient to meet the region's total loads. BPA simply cannot obtain the non-Federal power under present law.
>
> The [legislation] seeks to address the allocation issue by directing in section 5(g) that BPA commence, within nine months after enactment, negotiations and offer initial long-term, not to exceed 20 years, contracts to each of the following types of customers:
>
> (A) existing public body and cooperative customers and [nonpreference] investor-owned utility customers;
>
> (B) [nonpreference] Federal agency customers;
>
> (C) electric utility customers; and
>
> (D) [nonpreference] direct service industrial customers.

govern BPA's sale of all power not specifically allocated under these initial 20-year contracts, *see* Sections 5(a) and 10(c), and for the first time granted BPA authority to acquire power sufficient to support future contracts with all customers, *see* Section 6.[6]

One of Congress's primary purposes in assuring continued service to the DSIs for at least twenty years was to enable BPA's maximum efficient operation of System resources. Industrial customer loads are uniquely capable of withstanding instantaneous power interruptions without suffering damage to production equipment. By retaining the right to interrupt a portion of DSI power deliveries, BPA can secure low-cost regional operating reserves to protect other customers from temporary power shortages. In all other regions of the country, such reserves are provided only through standby generating facilities that impose significant costs upon consumers and produce no revenues except when utilized to generate reserve power. BPA's alternative arrangement—made possible solely by its industrial customers—permits most Northwest generating facilities to earn revenues continuously, thus reducing costs for all customers and minimizing the number of power plants needed to serve regional loads.

Congress's strong desire to retain these benefits of industrial customer service is reflected in the Act and well-chronicled in the legislative history. Congress required BPA to incorporate in its DSI contracts provisions assuring that a portion of the power allocated to the DSIs would remain subject to interruption by BPA for use as emergency reserves, *see* Section 5(d)(1)(A), and obligated the DSIs to pay significantly higher rates than BPA's preference utility customers in order to subsidize the residential consumers of nonpreference utilities. The reserve/revenue function thus assigned to industrial customer service was viewed as critical for the region.[7]

[6] *See* pp. 18-27 *infra*.

[7] These central statutory purposes of industrial customer service are explained in the legislative history:

While direct allocation of federal power to nonpreference customers represented a departure from the prior law, it was a departure considered necessary to secure the reserve/revenue advantages of DSI service and to avert prolonged litigation over administrative allocation of fixed BPA power supplies. At the same time, however, these mandated nonpreference entitlements were limited to initial 20-year contracts, and preference rules specifically were retained to govern BPA's sale of all power not allocated by Congress. Through new contracts with its industrial customers, BPA faithfully executed this statutory plan precisely as it had advised Congress it would do during four years of legislative hearings, and precisely as required by the Act.

Respondent preference utilities challenged these new DSI contracts claiming that provisions limiting the pur-

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> The [legislation] specifically authorizes the Administrator to enter into new contracts with these direct service industries. These contracts will provide power in amounts equal to, but not greater than, that which these companies are now entitled under existing contracts with BPA, and the terms of these contracts will require that these companies continue to supply reserves for the region.
>
> These industries will also pay significantly higher rates under the new contracts. These higher rates permit the Administrator to enter into contracts with the region's investor-owned utilities for an exchange of power equal to the utilities' residential load. This exchange will permit residential customers of investor-owned utilities to share in the benefits of the lower-cost Federal resources. The power sold to BPA will be sold at the utilities' average system cost and purchased back at the rate paid by the preference customers' utilization [sic] their general requirements. The loss in revenue to the Administrator is in effect returned by the higher direct service industry rates. By providing these residential customers wholesale rate parity with residential customers of preference utilities, the amendment serves in a substantial way to cure a major part of the allocation problem.

House Commerce Report, at 29 [Appendix D, at D69]. *See also* 126 Cong. Rec. S 14691 (daily ed. Nov. 19, 1980) (Remarks of Sen. Jackson) [Appendix J].

poses for which BPA can restrict DSI power deliveries violated the Act's preference rules by denying Respondents the unfettered right to appropriate this power for their own uses. BPA and the DSIs argued below that these contract provisions reflect explicit statutory language and are consistently affirmed in the Act's legislative history.[8] Congress, they argued, directly allocated power to the DSIs, and authorized BPA to restrict deliveries of this power only in furtherance of specific regional interests.[9] Preference rules as retained under the Act govern preference customer rights to power remaining *after all* statutory customer entitlements have been met, but do not diminish these mandated allocations.

Although acknowledging that BPA's statutory interpretation is entitled to substantial deference and finds support in the Act's legislative history, the Ninth Circuit nevertheless found that interpretation "unreasonable" and struck the disputed contract provisions. Proceeding from the premise that the power at issue had not been statutorily allocated to the DSIs, the Court held that BPA violated the Act's preference rules by limiting its contract rights to

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[8]The Opinion concludes that Congress neither "intended" nor "ratified" the disputed DSI contract provisions, 686 F.2d 708, 713 & n.5, but completely overlooks Congress's statement that it "understands and intends" these provisions just as they were explained by BPA at Congress's request.

[9]Under both pre- and post-Act contracts the DSIs have been allocated an "amount of power," measured in kilowatts, sufficient for their full loads. Section 5(d)(1)(B). The pre-Act DSI contracts [Appendix N] permitted BPA to restrict 25% of this power "at any time." The new contracts [Appendix H] permit such restriction "at any time and for any reason in order to protect Bonneville's ability to meet its Firm Obligations." This change implements the specific reserve functions assigned to DSI loads under §§ 3(17) and 5(d)(1)(A) of the Act, and eliminates BPA's pre-Act practice of restricting delivery of this DSI power at the unfettered request of preference utilities. It is the lawfulness of this change that is at issue here. *See* pp. 24-27 *infra*.

restrict DSI power deliveries, thereby denying preference utilities the use of such power as they deem fit.[10]

By virtue of this holding, the authority to determine the purposes for which industrial customer loads may be interrupted has been shifted from Congress and the responsible federal agency to preference utility customers. It is from this decision that the instant Petition follows.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW VIOLATES ESTABLISHED PRINCIPLES OF JUDICIAL REVIEW AND DIRECTLY CONTRAVENES CONGRESS'S STATUTORY PLAN FOR ALLOCATING FEDERAL POWER TO NON-PREFERENCE CUSTOMERS

1. In Misapplying Preference Rules Under the Act the Opinion Subjects BPA's Statutory Interpretation to a Heightened and Improper Standard of Review.

While reciting the proper review standard and acknowledging the basis for BPA's statutory interpretation in the legislative history, the Ninth Circuit *sub silentio* applied an extraordinary standard of review in holding that interpretation to be "unreasonable." Characterizing the disputed contracts as denying preference customers the right to certain power, the Court declined to credit Congress with having intended this arrangement absent a "more direct" mandate. 686 F.2d 708, 713. Such scrutiny—which accords to preference interests presumptive immunity from legisla-

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[10]The Court also assumed that preference utilities use such power for their own consumers, rather than for resale to other utilities and DSIs. 686 F.2d 708, 715 n.9. This assumption is simply wrong. Under the Act Congress provided sufficient power to serve the consumers of all utilities, and the power at issue here will be resold by Respondent preference utilities at higher prices to other utilities and to the DSIs themselves. *See* pp. 29-30 & n.28 *infra*.

tive revision—finds no support in prior decisions articulating the standards for judicial review of administrative action. This Court has repeatedly held that an agency's interpretation of its own enabling statute is entitled to substantial deference, *CBS v. Federal Communications Commission*, 453 U.S. 367, 382 (1981); *United States v. Rutherford*, 442 U.S. 544, 553 (1979), particularly when the law is new and the agency was directly involved in its development, *Zuber v. Allen*, 396 U.S. 168, 192-93 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Development Reactor Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). "The standard of judicial review is whether the agency interpretation was reasonable. It does not have to be the only reasonable construction or the interpretation that a court would choose if first presented with the question; it only must be a reasonable interpretation." *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981), citing *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975); *Udall v. Tallman, supra*, 380 U.S. at 16; *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153-54 (1946).

Proper observance of these principles is particularly warranted under the circumstances here presented. BPA rendered continuous and substantial assistance to Congress in drafting and implementing this legislation, consulting on the Act's numerous technical provisions and preparing for contract negotiations subsequent to passage. This extraordinary administrative contribution to the development of a highly technical and complex statute was expressly acknowledged by Congress, *see* 125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) [Appendix C], 126 Cong. Rec. H. 9848-9 (daily ed. Sept. 29, 1980) (remarks of Rep. Dingell) [Appendix G]. Moreover, the contract provisions overturned by the Ninth Circuit were taken directly from the language of the Act, *see* Sections 3(17), 5(d)(1)(A), and from the three accompany-

ing Congressional reports.[11] BPA's interpretation of these provisions was consistent throughout the legislative process.[12]

Imposition of this heightened and improper review standard proceeds from the Ninth Circuit's fundamental misconception of the role assigned to preference rules under the Act. Congress chose to allocate power directly to both preference and nonpreference customers under long-term contracts, and retained the preference provisions of prior laws to govern administrative sale of all power not statutorily allocated. *See* Sections 5(a), 10(c). The preference rules thus retained have always been construed to govern administrative allocation of *uncommitted* power, which under the Act would include power that is "surplus" to BPA's statutorily-mandated contract obligations, *see* Section 5(f), and all power that BPA is authorized to sell following expiration of these initial mandated contracts.[13] Preference rules have never been construed to condition Congress's latitude in allocating federal power by raising a presumption of preference customer entitlement that can be overcome only by "explicit statutory exception"—a requirement imposed here for the first time by the Ninth Circuit.

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[11] Paragraph 7(c) of the DSI contract [Appendix H]—the basic provision at issue here—was expressly ratified in and taken from the *House Interior Report*, at 48 [Appendix E, at E106-107]. This report language was provided to Congress by BPA on request, *see* Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug 19, 1980), VIII Contract Official Record ("Record") 2334-51 [Appendix I], and was expressly deemed to represent the Senate's intent as well, 126 Cong. Rec. S 14691, S 14698 (daily ed. Nov. 19, 1980) (remarks of Senators Jackson and McClure) [Appendix J]. *See also House Commerce Report*, at 52, 61-2 [Appendix D, at D107, D122-D123]; *Senate Report*, at 23, 28, 59 [Appendix F, at F47-F48, F56-F57, F74].

[12] *See* Memorandum regarding "BPA Obligations With Respect To DSI Top Quartile," XXV Record 6748-50 (excerpting 1978 and 1979 BPA interpretations) [Appendix K].

[13] *See* pp. 21-23 *infra*.

That Congress enjoys complete discretion in crafting preference rules to suit particular allocation needs is evident from consideration of other statutes under which rights have been accorded to various classes of nonpreference customers without "explicit exception" to general statutory preference provisions.[14] Indeed, no such "explicit exception" has been thought necessary, because the preference mechanism is simply inapplicable to power allocated directly by Congress. Previous decisions examining the scope of statutory preference rules have proceeded from a particularized analysis of relevant statutory provisions and have deferred to Congressional direction where interests other than preference have been protected. Thus, federal power marketing agencies are not required to sell power to preference customers when such sales would interfere with a primary purpose of the statute authorizing the federal project from which such power is derived, *Anaheim v. Duncan*, 658 F.2d 1326, 1330 (9th Cir. 1981); *Santa Clara v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978), *cert. denied sub nom. Pacific Gas & Electric Co. v. Santa Clara*, 439 U.S. 859 (1978); *Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 727 (9th Cir. 1975), *cert. denied sub nom. Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976), and are not required to breach valid

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[14]For example, 16 U.S.C. §§ 837-837h grants BPA's nonpreference customers in the Northwest a statutory priority in power sales over BPA preference customers in the Southwest. The Hungry Horse Dam Act, 43 U.S.C. § 593a, grants nonpreference customers in Montana priority over preference customers in other states, and has twice been reaffirmed by statute. 16 U.S.C. § 837h; 16 U.S.C. § 839g(f). Congress also required that power from the Hanford New Production Reactor be divided equally between preference and nonpreference customer classes. Pub. L. 87-701, § 112e (Sept. 26, 1962), 76 Stat. 604 [Appendix Q]. The Niagara Power Project Act, 16 U.S.C. §§ 836-836a, reserves for preference customers only 50% of the power from the Niagara Project, and most of the remaining power is reserved for sale to nonpreference industrial customers. 16 U.S.C. §§ 836(b)(1)-(3). None of these laws repeals or creates an explicit exception to general statutory preference provisions.

power supply contracts with nonpreference customers, *Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978).

Most strikingly, courts have rebuffed previous preference customer attempts to secure for themselves power otherwise statutorily authorized for sale to nonpreference industrial customers. In *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F. Supp. 22 (E.D. Tenn. 1954), *aff'd* 231 F.2d 446 (6th Cir. 1956), a preference customer of the Tennessee Valley Authority ("TVA") brought suit challenging TVA's sale of power directly to a nonpreference industrial customer. Plaintiff argued that TVA was obligated by statutory preference to sell this power to plaintiff for resale to nonpreference customers. In rejecting this claim, the court carefully noted that the statute expressly contemplates direct TVA sales to nonpreference industries in order to assure the highest possible load factors and revenue returns, thereby subsidizing domestic and rural power purchasers. Viewing preference in this particular legislative context, the Court stated in language applicable here:

> The provisions cited are not conflicting so as to vitiate the effectiveness of one as opposed to the other. In fact they are in complete harmony. The policy voiced by the statute empowering defendant to sell direct to industry and pass on to members of the preferred classes the benefits derived thereby are salutary and in furtherance of the avowed intent of the preceding section. . . . As defendant points out, through the years the earnings realized from such direct sales have been reflected in lower wholesale rates to distributors such as plaintiff with a resulting saving to the ultimate consumer. . . . The position sought by plaintiff would actually circumvent the true intent of Congress that the cost of power to domestic and rural users be kept at the lowest possible rates. Instead, the result would be the enrichment of a small class of distributors such as plaintiff. *Id.*, at 26.

This analysis stands in sharp contrast to the presumption of entitlement accorded preference interests by the Ninth Circuit. As respects both BPA and TVA, statutory structure and history plainly reveal an intention to assure the availability of power for sale to nonpreference industrial customers, notwithstanding the operation of general statutory preference provisions. However, as the Ninth Circuit itself recognizes, 686 F.2d 708, 715 n.9, the results reached by the two courts in interpreting this common Congressional mandate stand in irreconcilable conflict.

Indeed, if the Ninth Circuit's view of statutory preference were sound, the Act would have been entirely unnecessary. Under the Court's reading, Sections 5(a) and 10 (c) would retain inviolate pre-existing preference customer entitlements to power, notwithstanding Congress's express allocation of power to nonpreference customers under initial 20-year contracts. The perceived inadequacy of traditional preference arrangements in governing the allocation of BPA power was the very reason for Congressional action in the first instance. Given a projected insufficiency of power to meet demand, simple operation of preference rules would have resulted in the denial of federal power to whole classes of nonpreference customers, utilities and industries alike. Congress intervened to accomplish precisely what preference could not: an appropriate and equitable allocation of federal power among all regional customers. The contrary meaning accorded preference under the Opinion turns back the clock and renders nugatory the Act's very purpose.

2. The Opinion Overturns Congress's Plan Which Allocates Power to Nonpreference Industrial Customers While Reaffirming Preference Customer Rights to All Unallocated Power.

Resolution of this case turns on a single issue of statutory construction: what are the circumstances under which BPA may restrict deliveries of a portion of DSI power for

supply to other customers? BPA interpreted the Act as having allocated this portion of power to the DSIs, Section 5(d)(1)(B), and having protected that allocation from preference customer challenge, Section 5(g)(7); accordingly, BPA incorporated in DSI contracts provisions allowing restriction of this power only for the reserve purposes specified in Sections 3(17) and 5(d)(1)(A). The Ninth Circuit, on the other hand, found no such statutory allocation to the DSIs, and therefore held this portion of power subject to preference customer claims under the Act's general preference provisions, Sections 5(a) and 10(c).

The premise upon which the Opinion rests is flatly wrong. Section 5 of the Act sets forth an integrated plan for allocating power to each BPA customer class—including the DSIs—and obligates BPA promptly to offer, negotiate, and execute initial 20-year supply contracts with all such customers. This allocation plan was considered by Congress to be "the heart of the regionally-negotiated 'peace' settlement." 126 Cong. Rec. H 9864 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) [Appendix G].

Section 5(d) prescribes the "amount of power" to be supplied the DSIs and the manner in which such loads are to be served. Section 5(d)(1)(B) requires BPA to offer each DSI an initial long-term power sales contract for "an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'" "Amount of power" is a commercial term used in federal power marketing contracts with industrial customers, and refers to the size of the customer's full contract load as measured in kilowatts. *See* DSI Contract (1975), § 4 [Appendix N]. Thus, Section 5(d)(1)(B) allocates to each DSI the same full load of power to which it was entitled under its pre-Act contract.

Section 5(d)(1)(A) directs that BPA retain rights to restrict deliveries of a portion of this power where neces-

sary to provide reserves for BPA's "firm power loads."[15] In defining these restriction rights, BPA divides the DSIs' contract load into quartiles. BPA plans "firm" power resources to serve three quartiles of this load, and plans to serve one quartile—the "top quartile"—primarily with "nonfirm" power. It is the DSIs' top quartile that is most subject to restriction under Section 5(d)(1)(A).[16]

Use of nonfirm power to serve the DSIs' top quartile allows BPA to achieve certain operating efficiencies that produce the reserve/revenue advantages of DSI service intended by Congress.[17] However, regardless of the kind of power used by BPA in serving DSI loads it is clear under

[15]"Firm" power refers to hydro power whose annual production is assured even if streamflows do not exceed their historically-worst ("critical") level. "Nonfirm" power refers to hydro power whose annual production is contingent upon the availability of above-critical streamflows. "Firm loads" are those loads for which BPA is obligated to provide continuous service, and which therefore are supported with firm power resources. All of BPA's power sales obligations to utility customers are "firm load obligations." This means that BPA has planned sufficient firm resources to serve Respondent utility customers' requirements, and that the nonfirm power here at issue is not needed to serve those requirements, absent emergency shortages.

[16]Under the Act and the new DSI contracts, BPA's right to restrict power deliveries to the DSIs' second quartile has been significantly expanded. *See, e.g., House Interior Report*, at 48 [Appendix E, at E106-E107]; DSI Contract (1981), § 7(d) [Appendix H]. While these second quartile restriction rights are not at issue here, it is important to note that in entering new contracts under the Act the DSIs surrendered significant rights enjoyed under their pre-Act contracts, with the understanding that no portion of their allocated loads would be restricted except when necessary to protect BPA's firm load obligations. *See* Statement of Jack A. Speer before the House Subcom. on Water and Power Resources [Appendix O].

[17]Use of nonfirm power when available to serve the DSIs' top quartile maximizes efficient operation of System resources by enabling BPA to meet its Section 5(d)(1)(B) supply obligations to the DSIs without acquiring additional costly generating plants. Because the DSIs pay the same premium rates for nonfirm service

Section 5(d)(1)(B) that the DSIs have been allocated by Congress an "amount of power" sufficient to meet their full loads, which power may not be restricted except for the specific reserve purposes set forth in Section 5(d)(1)(A).

Section 5(b) prescribes the power to which all utilities are entitled, including both preference (publicly-owned) and nonpreference (privately-owned) utilities. It obligates BPA to meet the *net* power requirements—and only the net power requirements—of all utility customers. These net power requirements refer to the power needed by the utilities from BPA in order to assure full service to their consumers. Thus, for the vast majority of non-generating utilities which do not produce any power of their own, Section 5(b) obligates BPA to supply *all* the power necessary to meet their consumer demands. However, for those few generating utilities which do produce power, Section 5(b) obligates BPA to supply only the net *additional* power necessary to assure full service to their consumers; under Section 5(b)(1), generating utilities are obligated to use the power that they themselves produce to supply their own consumers.

Under Section 5(f), power that remains *after* BPA has satisfied its Section 5(b), (c), and (d) contract obligations to all customers is "surplus" that may be sold in accordance with statutory preference rules. Thus, the Act makes clear that power directly allocated to the DSIs under Section 5(d)(1)(B) is not subject to claim by preference customers as "surplus."

Section 5(g)(7) of the Act provides that "[t]he Administrator shall be deemed to have sufficient resources for the

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that they pay for firm service, this arrangement reduces rates for all other BPA customers by returning to BPA four quartiles of "firm service revenues" for only three quartiles of "firm service costs." These significant regional benefits accrue only because industrial customers are uniquely capable of operating their top quartile subject to the annual availability of nonfirm power. *See* Letter of BPA Administrator to Hon. Abraham B. Kazen (Aug. 19, 1980), VIII Record 2334-51 [Appendix I].

purposes of entering into the initial contracts specified [for all customers]." Through this provision Congress removed the indispensable element of all preference claims—insufficient power to enter into contracts with both preference and nonpreference customers, *see, e.g., Santa Clara v. Andrus, supra,* 572 F.2d at 660; *Arizona Power Pooling Assn. v. Morton, supra,* 527 F.2d at 721. The express purpose of Section 5(g)(7) was to immunize these statutorily-mandated nonpreference customer contracts from preference customer challenge during their 20-year terms, thus providing a period of regional calm while BPA exercises its new authority under Section 6 of the Act to acquire sufficient power for all customers. Following expiration of these initial contracts BPA will be obligated to possess power *actually* sufficient to support any future contracts with nonpreference customers, which contracts thus are made subject to the Act's preference provisions.[18]

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[18]The purpose and significance of Section 5(g)(7) were discussed at length in the legislative history. Congressman Foley of Washington, a leading sponsor of the bill, stated at the time of House passage:

> It is said that this bill will not prevent litigation. That is certainly true. There may be litigation over rates, over new resources, and over the meaning of many provisions that have been added to the bill largely in order to reassure the bill's critics. But the key point is that litigation under this bill will not include litigation to determine the validity of each entity's new power supply contract.
>
> On the contrary, by stating that BPA shall be "deemed" to have sufficient power to enter into all the 20-year power sales contracts mandated by the legislation, the bill specifically ensures that these new contracts will be valid against legal challenge. This provision does not "guarantee" actual power deliveries in day-to-day operation, but it does guarantee that whatever litigation occurs on power matters will not be litigation going to the heart of any BPA customer's power sales contract and power allocation—the most important single result of this legislation. 126 Cong. Rec. H 10678 (daily ed. November 17, 1980) (remarks of Rep. Foley) [Appendix L].

Sections 5(a) and 10(c) reaffirm and retain prior statutory preference rules governing the administrative allocation of uncommitted power. As indicated, these preference rules are only operable in the absence of direct Congressional intervention; nothing in the language or history of Sections 5(a) and 10(c) suggests that preference customers are entitled to power that has been statutorily allocated to the DSIs.[19]

Congress's reaffirmation of preference in Sections 5(a) and 10(c) of the Act thus can be harmonized with its protection of nonpreference customer contracts in Section 5(g)(7): only *initial* mandated power contracts, and only the *full amount of power* allocated in those contracts, are protected.[20] Sales of "surplus" power and all sales of power under future contracts are governed by the statutory preference rules expressly retained in the Act.[21]

See House Commerce Report, at 37, 64 [Appendix D, at D82, D126-D127] ["Section 5(g)(7) is intended to ensure that a challenge (on the basis that the Administrator lacks legal authority on account of insufficient power resources) to the initial contracts required to be offered under this Act will not be sustained."].

[19]Section 5(a) retains and reaffirms the preference clause of the Bonneville Project Act, while Section 10(c) is a savings clause for "other Federal laws" that accord preference and priority to publicly-owned utilities and cooperatives. Section 10(c) was enacted expressly for the purpose of reassuring preference customers in other regions of the United States who feared that the Act—by mandating contracts for and allocating power directly to nonpreference customers—would weaken their rights under federal power marketing statutes applicable to them. *See, e.g., House Commerce Report*, at 34 [Appendix D, at D78].

[20]The Section 5(g)(7) "deemed sufficient" language was added to the Act by the Senate Energy and Natural Resources Committee at the same time as Sections 5(a) and 10(c), *see generally Senate Report*, at 5 [§ 5(c)(1)], 12 [§ 9(c)(2)] [Appendix F, at F12, F28], expressly to protect the mandated DSI contracts in the face of these preference provisions.

[21]As BPA stated in its letter offering the new mandated DSI contracts here at issue [Appendix M]:

Pursuant to this statutory plan BPA promptly negotiated initial long-term power supply contracts with each mandated customer class. Paragraph 7(c) of the DSI contracts [Appendix H] implements Section 5(d)(1)(A) by providing that DSI power deliveries may be restricted "in amounts up to 25 percent of the Purchaser's Operating Demand, at any time and for any reason in order to protect Bonneville's ability to meet its Firm Obligations." Paragraph 7(c) thus permits BPA to restrict DSI top quartile deliveries where necessary—but only where necessary—to provide reserves for firm load obligations, including Section 5(b) net power requirement obligations to utility customers; it does not permit such restrictions to supply preference utility customers with power that is in *excess* of their net power requirements and that will simply be resold at higher prices to entities other than their own consumers.[22] It is this limitation on the purposes for which DSI

This contract is the initial contract that Bonneville is required to offer each Industrial Purchaser pursuant to sections 5(d)(1)(B) and 5(g) of the Regional Act. As you know, the Act contemplates in section 5(d)(1) [A] additional, future contracts with each existing Industrial Purchaser, but unlike this initial contract, such future contracts do not have the benefit of the statutorily deemed sufficiency of power available to the Administrator under section 5(g)(7). Bonneville's ability to offer any future contracts to its nonpreference customers, including the Industrial Purchasers, is therefore largely dependent upon Bonneville achieving firm load/resource balance while these initial contracts are in effect.

[22]Respondent utilities argued below that the nonfirm power here in dispute might be needed to serve their consumers in the event that their own power plants fail to meet planned output. This option, however, is specifically precluded by the Act and by the Pacific Northwest Coordination Agreement, under which Respondents must assure the production of power from their own resources. BPA has never provided nor been obligated to provide reserves for the protection of utility-owned resources against possible failure; it maintains reserves only to assure its own statutory and contractual supply obligations. *See* Section 5(b)(1); Bonneville Power Administration, U.S. Dept. of Interior, ***Draft Environmental Statement*** (DES-77-21) II-71 (July 22, 1977) [Appendix P].

loads may be restricted that was challenged by the preference utilities and struck down by the Ninth Circuit.[23]

Proceeding from the premise that Congress did not allocate nonfirm power to the DSIs, the Opinion concludes that BPA is obligated by the Act's preference provisions to make this power available to Respondent preference utilities at their election, and not simply for the limited reserve purposes set forth in Section 5(d)(1)(A). 686 F.2d 708, 712. This erroneous conclusion flows from the Court's failure to understand that Congress (i) allocated the DSIs under Section 5(d)(1)(B) a specific "amount of power," and (ii) limited under Section 5(d)(1)(A) BPA's pre-Act rights to restrict DSI power deliveries.

In its amended Opinion, the Court noted that Section 5(d)(1)(B) "expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs." 686 F.2d 708, 712 n.4. Contrary to the Court's assertion, Section 5(d)(1)(B) does *not* link the DSIs' present allocation to their "entitlement" under 1975 contracts; rather, it links only the "amount of power" allocated the DSIs under the Act to the "amount of power" allocated under their pre-Act 1975 contracts. It is this "amount of power"—sufficient to serve the full four quartiles of DSI loads—that was specifically protected from preference customer challenge by Section 5(g)(7).

It is true that under the DSIs' 1975 contracts BPA was authorized to restrict top quartile power deliveries for supply to preference customers "at any time," DSI Contract (1975), General Contract Provisions § 8(b) [Appendix

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[23]Respondents actually challenged four separate contract provisions, all relating to and implementing paragraph 7(c) restriction rights. The decision of the Ninth Circuit extends to all four DSI contract provisions.

N.][24] However, these restriction rights were sharply limited by the Act, and Sections 3(17) and 5(d)(1)(A) now authorize BPA to restrict top quartile deliveries only "to avert particular planning or operating *shortages,* for the benefit of *firm* power customers," that is, to protect "firm power loads." (Emphasis supplied.) *See Senate Report,* at 23 [Appendix F, at F47-F48] ("It is not intended [that BPA will restrict DSI power] to protect other than firm loads.")

The Ninth Circuit simply overlooked this fundamental change in BPA's restriction rights. The Opinion cannot be squared with either Section 5(d)(1)(B), which allocates to the DSIs an "amount of power" for their full loads, or Section 5(d)(1)(A), which expressly limits the purposes for which deliveries of this power may be restricted. Contrary to the assumption upon which the Opinion rests, no portion of the DSI load lacks an initial statutory allocation; BPA's right to restrict top quartile power deliveries for specified reserve purposes neither diminishes the protection from preference customer challenge afforded DSI contracts under Section 5(g)(7), nor renders top quartile deliveries subject to restriction for nonreserve purposes.

Nor does BPA's use of nonfirm power in serving the top quartile suggest that this portion of DSI load lacks an initial statutory allocation. The fact that nonfirm power is contingent upon annual streamflow conditions does not diminish BPA's statutory obligation to supply the full amount of the DSIs' top quartile when such power is available. Only after meeting this top quartile obligation may BPA sell any remaining nonfirm power to preference customers as "surplus" under Section 5(f).[25]

BPA's interpretation of these statutory provisions—as explained to Congress and reflected in the DSI contracts—

[24] In so doing, however, BPA was obligated to compensate the DSIs for the power diverted, *see House Commerce Report,* at 62-3 [Appendix D, at D124]. The sole reason for this compensation was that under their 1975 contracts the DSIs had been initially allocated an "amount of power" for their full loads.

[25] The Court's conclusion that "nonfirm power is no less subject to the preference than firm power," 686 F.2d 708, 712, is com-

harmonizes the Act's simultaneous retention of general preference rules and conferral of specific nonpreference customer contract rights. It is basic to the canons of statutory construction that the Act's general preference provisions do not defeat the specific allocations of power to nonpreference customers. *See MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the enactment.' "). The Ninth Circuit's simplistic "preference analysis" ignores a key Congressional goal of assuring power for nonpreference customers, and destroys the complex statutory plan by which that goal was to be achieved.[26]

3. The Opinion Directly Impairs BPA's Ability to Secure the Reserve/Revenue Advantages of Industrial Customer Service Intended by Congress.

Congress and BPA spent four years refining the mechanics of industrial customer service under the Act. That service was designed to reduce costs for all regional customers by providing BPA with specific operating efficiencies and additional revenues. In destroying the reserve/revenue advantages of DSI service so fundamental to the Act's economic and environmental viability, the Opinion leaves regional power actors facing renewed uncertainty and the prospect of extended litigation.

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pletely irrelevant. Preference rules govern BPA's allocation of *all* power—firm and nonfirm—that has not already been committed by Congress. The nonfirm power here in dispute is used by BPA in meeting its Section 5(d)(1)(B) power supply obligations to the DSIs; therefore, this power has been allocated by statute, not by preference.

[26]The Opinion states that "the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers." 686 F.2d 708, 715. On the contrary, they are best served by an interpretation that ensures the sale of power as Congress intended. The Opinion neglects the most basic canons of statutory construction by failing even to consider Congress's express purpose of ensuring continued sales of BPA power to nonpreference customers. *See, e.g., House Commerce Report*, at 36-37 [Appendix D, at D80-D82].

Congress expressly sought to capitalize on the unique features of BPA's hydro system and the operating characteristics of DSI loads to provide regional reserves and meet all customer contract requirements at minimal costs. *See, e.g., Senate Report*, at 59 [Appendix F, at F74]; Letter of BPA Administrator to Hon. Abraham B. Kazen, VIII Record 2334-51 [Appendix I]; "BPA Obligations With Respect To DSI Top Quartile," XXV Record 6748-50 [Appendix K]. Under the Opinion, BPA will be forced to sell to a small group of preference utilities certain power that it had planned to use for DSI service in securing these interests. This power will be sold at lower rates than would have been paid by the DSIs to whom it was statutorily allocated. In addition, BPA may not be able to meet its statutory supply obligations to the DSIs or assure the availability of regional reserves without acquiring additional firm generating resources at significant economic and environmental costs. As the Ninth Circuit itself acknowledges, 686 F.2d 708, 715, under the Opinion BPA's revenues will be reduced and the rates paid by all other regional customers accordingly increased.[27]

[27]In limiting BPA's use of nonfirm power to serve the DSIs' top quartile, the Opinion leaves BPA unable to recoup four quartiles of DSI power sales revenues while incurring only three quartiles of firm power costs. *See* n. 17 *supra*. Under the Act's rate provisions it is essential that BPA receive this extra revenue in order to make possible an extension of the Act's rate subsidy for residential consumers of nonpreference utilities beyond 1985 without imposing additional costs on consumers served by non-generating preference utilities. The importance of DSI service in effectuating the Act's rate provisions is evident from the detailed narrative and computer analyses reprinted in the *Senate Report* and supplied in the letter of the BPA Administrator to the Hon. Abraham B. Kazen, chairman of a key House subcommittee. *See Senate Report*, at 56-79 [Appendix F, at F69-F84]; Letter of BPA Administrator to Hon. Abraham B. Kazen, VIII Record 2340 [Appendix I] (BPA's ability to serve DSIs with nonfirm power "is one reason why, from a rate impact standpoint, it is beneficial for other consumers that the DSIs are part of the regional power system in the Northwest.").

More particularly, the Opinion seriously jeopardizes continued DSI operations in the Northwest. The domestic aluminum industry presently is suffering a devastating recession. DSI rates have quadrupled in the past two years, eliminating the original cost advantages of Northwest aluminum production. Now, under the Opinion, the DSIs also face significant power delivery restrictions in excess of those authorized by the Act—an unfavorable quality of service compared with that available in other regions of the United States and abroad. As a result, Northwest producers may be forced to close their plants in favor of less costly and more secure operations elsewhere, thereby triggering significant revenue losses for BPA and the regional economy.

The immediate effect of the Ninth Circuit's decision will be to allow a small group of preference utilities which own and operate their own generating resources to substitute federal power—otherwise allocated to the DSIs—for the power that they themselves produce and are statutorily obligated to use in supplying their own consumers. These few utilities in turn will be enabled to sell their own power—now "displaced" with the DSIs' nonfirm power—at higher prices to other utilities and to the DSIs themselves.[28] Congress and BPA understood the windfall that would accrue to these few generating utilities if allowed to divert industrial customer loads for resale pur-

[28]Only those few large utilities operating their own generating facilities are able commercially to exploit the power diverted from industrial customer loads because they alone produce power capable of being "displaced" with this federal power and resold. The Ninth Circuit's failure to appreciate this displacement capability—and the potential for windfall gain made possible thereby—leads to its simple and incorrect conclusion that "[h]ere, the preference customers want the low-cost power for their customers." 686 F.2d 708, 715 n.9. As discussed, under the Act and the Pacific Northwest Coordination Agreement, Respondent utilities are not entitled to rely on this power to support their own generating resources. *See* n.22 *supra*.

poses, and expressly prohibited restriction of DSI deliveries except where necessary to serve important *regional* reserve interests. The Opinion thus makes possible under the Act precisely what was prohibited by the Sixth Circuit under the TVA Act: the enrichment of a small group of preference utilities at the expense of all other regional power users. *See Volunteer Electric Cooperative v. Tennessee Valley Authority, supra,* 139 F.Supp. 22.

In sum, the Ninth Circuit's decision is wrong—plainly wrong. BPA's implementation of the Act through contract provisions expressly described to Congress during the legislative process and in precise accordance with statutory directives must be deemed "reasonable" under any measure of that review standard. The contrary ruling imposed here emanates from an unarticulated standard of review under which the court has substituted its own policy views for those of Congress. The decision below imposes consequences of enormous importance to the future of regional power planning legislation and Pacific Northwest power supplies, thus warranting review and reversal.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and Opinion of the Ninth Circuit.

Dated: December 22, 1982

Respectfully submitted,

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Appendix A

CENTRAL LINCOLN PEOPLES' [708]
UTILITY DISTRICT, et al., Petitioners,

Public Power Council, et al.,
Petitioner-Intervenors,

v.

Peter JOHNSON, as Administrator of the Bonneville Power Administration, Department of Energy, et al., Respondents,

Aluminum Company of America, et al.,
Respondent-Intervenors.

No. 81-7561.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 6, 1982.
Decided April 6, 1982.

As Amended Sept. 7, 1982.

Rehearing and Rehearing En Banc
Denied Sept. 27, 1982.

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OPINION [709]

BOOCHEVER, Circuit Judge:

This case concerns the allocation of power under the newly enacted Pacific Northwest Electric Power Planning and Conservation Act, Pub.L.No.96-501, 94 Stat. 2697 (1980) (the Act). Public utility customers of the Bonneville Power Administration (BPA) contend that the power contracts offered to BPA's industrial customers violate those provisions of the Act that give preference to public utilities in the allocation of power. Because we find no explicit exception to the [710] unambiguous provisions of the Act that preserve the longstanding preference given to public utilities, we find the contracts invalid.

FACTS

BPA is the federal agency that markets federal hydroelectric power in the Pacific Northwest. Congress passed the Act to resolve competing claims to low-cost federal power. *See, e.g.*, H.R.Rep.No. 976 (Part II), 96th Cong. 2d Sess. 26 (1980) U.S.Code Cong. & Admin.News 1981, pp. 10052, 10113. The Act requires BPA to offer long-term contracts to all of its customers. BPA offered contracts to its direct service industrial customers (DSIs) on August 28, 1981. These contracts are the first to be offered under the Act and the first to be adjudicated.

BPA provides DSIs "Industrial Firm Power" which allows BPA to restrict its delivery of power to the DSIs for specified reasons. Each quartile, or fourth, of the DSI power is subject to different restrictions. The first quartile is served partially with nonfirm energy, the energy remaining after BPA has fulfilled its firm obligations. Nonfirm energy is the energy in excess of that which BPA can reliably plan on producing and is therefore provided only when such an excess exists.[1] Firm energy is the energy that BPA can reliably plan on producing and must be sufficient to serve BPA's firm loads. Firm loads are the power requirements that BPA must plan for and may not restrict.

Prior to the Act, BPA offered nonfirm energy first to the preference customers and then to the DSIs. Under the new contracts, BPA plans to offer nonfirm energy to the

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[1]BPA plans its future power resources on the assumption that during some periods the water levels used to generate power will be low or "critical." BPA plans on having at least the amount of power that it can produce at a critical water level and that power is therefore firm power. When the water level is greater than critical, the power generated from the excess water is nonfirm energy.

DSIs first. The preference customers challenge the contract provisions that effectuate this new method of allocation.[2]

ANALYSIS

I.

Applicable Standards

Section 9(e)(5) of the Act provides that suits to challenge final actions such as contract offers shall be brought in the United States Court of Appeals for the region. The original jurisdiction given this court by § 9(e)(5) raises procedural problems that will have to be resolved on a case-by-case basis. Because no factfinding is necessary in this case, we will treat it like a petition for administrative review. A myriad of variations may arise in suits brought under the Act, and we do not intend to bind the court to the procedures used in this case.

Section 9(e)(2) of the Act provides that the scope of review by this court of a sale of electric power is governed by the Administrative Procedure Act, 5 U.S.C. § 706. The Administrative Procedure Act specifies that in reviewing agency actions, a court shall decide all relevant questions of law, interpret statutory provisions, and determine the applicability of the statutory terms to agency action. The reviewing court must set aside agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* § 706(2)(A).

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[2]Four provisions in the contracts effectuate this interpretation. Section 7(c) provides that sales will be made to the first quartile prior to other sales of nonfirm energy. Section 7(e) provides that the adjustments for energy already used by the first quartile may not be made for sales of nonfirm energy to preference customers. Section 8(a)(2) provides that BPA will not sell nonfirm energy if it can be used for the first quartile. Section 8(c)(9) provides that BPA will attempt to acquire additional energy before requiring DSIs to repay energy advanced to the first quartile.

[1, 2] In interpreting the Act, we give substantial deference to BPA's construction of the statute because BPA is the agency charged with the Act's administration. *United States v. Rutherford*, 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 **[711]** (1979). This deference is especially appropriate because BPA's interpretation is a contemporaneous construction of a statute by those with the responsibility for setting it in motion. *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Columbia Basin Land Protection Association v. Schlesinger*, 643 F.2d 585, 600 (9th Cir. 1981). Additional weight is given the agency interpretation when the agency administrators participated in drafting the legislation as they did here. *Zuber v. Allen*, 396 U.S. 168, 192, 90 S.Ct. 314, 327, 24 L.Ed.2d 345 (1969). Our review is limited to whether BPA's interpretation of the Act is reasonable. *Columbia Basin*, 643 F.2d at 600. Only if BPA's interpretation is unreasonable may we conclude that BPA's contract offers violate the Act.

II.
The Preference

Giving all due deference to BPA's construction of the Act, we nevertheless find its interpretation unreasonable. We find that the explicit and longstanding preference retained in the Act controls rather than the ambiguous provisions relied upon by BPA to justify a change. Before examining the Act's legislative history and underlying purposes, we turn first to the express terms of the Act.

A. Pertinent statutory provisions

1. Preference provisions: Section 5(a) of the Act provides that:

> All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937....

At § 10(c), the Act further provides that:

> Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

The Bonneville Project Act, 16 U.S.C. § 832 *et seq.*, requires that BPA give preference and priority to public bodies and cooperatives in selling power. 16 U.S.C. § 832c (a). Thus, §§ 5(a) and 10(c) of the Act explicitly reaffirm the preference to public bodies established by the Bonneville Project Act.

Preference provisions have been included in federal power acts since 1906. Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation under the Federal Reclamation Statutes*, 9 Envt'l L. 601, 610 (1979). BPA's allocation of power has been subject to the preference since the Bonneville Project Act was passed in 1937. It is undisputed in this case that BPA previously interpreted the preference provision to apply to nonfirm power as well as firm power. Thus, prior to offering the contracts now at issue, BPA allocated nonfirm power according to the preference after it had first allocated firm power according to the preference. BPA's pre-Act interpretation of the preference was consistent with this court's interpretation of a preference clause under an analogous statute. *See Arizona Power Pooling Association v. Morton*, 527 F.2d 721, 725 (9th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed. 2d 761 (1976) (holding that a similar preference clause in the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c), applied to sales of thermally generated electrical power).

Any modification of the preference, in view of its long history and clear reaffirmation in the Act, should be explicit. *See generally New England Power Co. v. New Hampshire*, ... U.S. ....., ..., 102 S.Ct. 1096, 1102, 71 L.Ed.2d 188 (1982) (courts "have no authority to rewrite . . . legislation based

on mere speculation as to what Congress 'probably had in mind' ").

2. Basis for BPA's interpretation: BPA's interpretation is based on the assumption that § 5(d)(1)(A) of the Act requires giving the DSIs priority to nonfirm energy for their first quartile. Subsection 5(d)(1)(A) provides that:

> The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. *Such sales shall provide a portion of the Administrator's reserves* [712] *for firm power loads within the region.* (emphasis added).

Section 3(17) of the Act defines "reserves" as the power needed to avert shortages for the benefit of firm power customers.[3] To evaluate the BPA's conclusion, it is first necessary to consider the manner in which nonfirm energy is initially allocated.

The sale of nonfirm energy is contingent on availability. When sufficient nonfirm power is available, BPA provides it as needed to both the preference customers and DSIs. When, however, there is insufficient nonfirm energy to fill the needs of both types of users, the preference clause appears on its face to mandate, and, as previously interpreted by the BPA, did require, that the nonfirm energy needs of the preference customers be met before the nonfirm needs of the DSIs. Application of the preference in this manner interrupts the flow of nonfirm power to the DSIs. BPA and the DSIs argue that this process violates § 5(d)(1)(A) because it makes the DSIs' nonfirm power a reserve for the preference customers' nonfirm needs.

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[3]BPA contracts to provide the DSIs with power. If, however, a power plant outage occurs or energy use peaks, for example, so that BPA could not meet its firm obligations, BPA would interrupt its service to the DSIs and use the power then available to serve its other loads. In this way, the power allocated to the DSIs serves as a reserve.

[3] The BPA and DSIs' reasoning is flawed. Although applying the preference may deprive the DSIs of nonfirm power, that does not constitute using reserves for nonfirm loads. This so-called interruption results from insufficient energy to make the initial allocation of nonfirm power to the DSIs, not from the use of energy already allocated to the reserve. It is meaningless to speak of interrupting the flow of power that has not yet been allocated. No customer has an expectation of receiving any nonfirm power until BPA allocates it. The power allocated to the DSIs' first quartile serves as a reserve for firm loads because it may be interrupted on a few moments notice if, for example, the demand for firm power peaks. *See* note 3, *supra*. It is a non sequitur to conclude from the fact that the reserve cannot be used for nonfirm needs that the nonfirm energy cannot initially be allocated to the preference customers in accordance with the preference.[4]

The only reasonable interpretation of § 5(d)(1)(A) that is consistent with the preference is that the initial allocation of nonfirm power is no less subject to the preference than firm power. Nonfirm power does not become part of the reserve in the DSI load unless there is nonfirm power in excess of the amounts needed by the preference customers. When there is no surplus over the amount needed by the preference customers there can be no provision to the DSIs and, thus, no reserve created. When, however, there is suf-

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[4]We find no support for the contention that § 5(d)(1)(B) guarantees the nonfirm power needed to serve the DSIs' first quartile. Section 5(d)(1)(B) expressly links the DSIs' present allocation to their entitlement under the 1975 contracts. It is undisputed that under the 1975 contracts the DSIs received nonfirm power only after the preference customers filled their nonfirm needs. Thus, subsection (B) does not entitle the DSIs to nonfirm power for the first quartile under the contracts now at issue. Moreover, § 5(g)(7) does not alter this conclusion because it does not grant the DSIs any greater entitlement than what they received under the 1975 contracts.

ficient energy to provide nonfirm power to both the preference customers and DSIs, the non-firm power allocated to the DSIs becomes a reserve for firm loads. If, for example, a preference customer's firm load peaked above BPA's firm power resources so that BPA's obligation exceeded its ability to furnish firm power, BPA would meet the peak demands with energy from DSI's reserves. This straightforward construction is preferable because it harmonizes what would otherwise be conflicting provisions of the Act. *See generally Erlenbaugh v. United States*, 409 U.S. 239, 244, 245, 93 S.Ct. 477, 480, 481, 34 L.Ed.2d 446 (1972); *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488-89, 68 S.Ct. 174, 177-78, 92 L.Ed. 88 (1947).

Moreover, even if § 5(d)(1)(A) could be construed as creating an exception to the [713] preference, BPA's interpretation is unreasonable given the clear preference provisions to the contrary. Section 5(d)(1)(A) specifies only that the reserve shall be used for firm power loads: it says nothing about the provision of nonfirm energy. To accept BPA's interpretation, we would have to infer that the interruption of the DSI nonfirm power that would result from the application of the preference when there is insufficient power for all users is equivalent to using reserves for nonfirm loads. We would also have to infer that any allocation of nonfirm power that might interrupt the flow of nonfirm power to the DSIs is not subject to the preference. It is unreasonable to assume that Congress intended to create such a significant exception to the preference through the indirect device of a provision referring to reserves.[5] We dis-

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[5]BPA and the DSIs argue that BPA informed Congress of its proposed interpretation of the Act while the Act was still pending and that, in passing the legislation, Congress accepted BPA's interpretation. We rejected a similar argument in *Arizona Power Pooling, supra*, where the agency authorized to allocate federal power argued that Congress had indirectly "approved" an exception to the preference through actions it had taken in regard to annual appropriations for the project at issue in that case. Although it was undis-

cern no basis in the explicit preference provisions of the Act for differentiating between the preference accorded nonfirm and firm power. We believe that if Congress had intended to override its twice-expressed and explicit preference mandate it would have spoken more directly.

Although the language of the Act appears clear, and thus controlling, we briefly examine the Act's history and purpose to see if they are consistent with what appears, on the Act's face, to be Congress' clear intent.

B. Legislative History

The legislative history does not provide clear support for either side. Thus, although the preference to public utilities is explicitly recognized,[8] we acknowledge that there are also

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puted that Congress had taken certain actions in passing appropriations that supported the agency's decision not to sell interim power to a preference customer, this court concluded that:

> [t]his fact in and of itself does not justify the inference of congressional approval of purchase negotiations that were allegedly conducted in violation of the preference clause.

527 F.2d at 726. The court went on to note that nothing in the record or legislative history indicated that Congress was aware that its actions on appropriations would be construed to affect preference rights. *Id.*

Similarly, in the present case, there is no more indication that Congress was aware that BPA's interpretation would create an exception to the preference than there is that Congress intended to create such an exception through the indirect device of the reserve provision. Precise knowledge of the agency position is necessary to a finding that Congress ratified it. *Id.*

[8]The House Committee of Interior and Insular Affairs stated in its Report "it is not, however, a purpose to interfere in any way with, or modify the statutory rights of preference customers either within or without the region." H.R.Rep.No.976 (Part II), *supra*, at 26, U.S. Code Cong. & Admin.News at p. 10114. *See also Id.* at 34. The House Committee on Interstate and Foreign Commerce responded in its report to concerns that the Act would change the

statements supporting BPA's interpretation.[7] It is unfortunate that the [714] legislative history fails to give a clearer indication of Congressional intent. The inconsistent character of the legislative history is reflected several places in the Act, leading inevitably to burdensome resort to the courts for interpretation.

C. Purpose of the Act

Congress intended to achieve several purposes in the Act. It primarily intended to determine how federal power should be allocated and to give BPA authority to acquire power resources. *See, e.g.*, H.R.Rep.No.976 (Part I), *supra*, at 27. In its allocation of power, Congress clearly mani-

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meaning or applications of the preference. It stated that it did not want to undo nearly 80 years of history and that specific provisions were designed to protect the entitlement of preference customers to the full Federal base system. H.R.Rep.No.976 (Part I), *supra*, at 26.

[7]Support for BPA's position can be found in Part II of the Report. It states that:

> Approximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation . . .

H.R.Rep.No.976 (Part II), *supra*, at 48, U.S. Code Cong. & Admin. News at p. 10136. The quartile referred to is the first quartile. Appendix B to the Senate Report provides that the first quartile:

> would be served with resources which are in excess of critical planning amounts but operated to meet the entire DSI load as if it were firm.

S.Rep.No.272, 96th Cong. 2d Sess. 59 (1980). The following sentence in the appendix to the Senate Report, however, indicates the ambiguity in Congress' direction to treat the first quartile as firm. It provides:

> The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow and maintaining an ability to restrict an

fested its intention to retain the preference clause. *Id.* The purpose of the preference is to give public bodies the benefit of public power, and to provide low-cost power to the greatest number of consumers. Fereday, *supra,* at 604, 632-33. Congress also intended to provide low-cost power to residential consumers of private utilities. H.R.Rep.No.976 (Part II), *supra,* at 34-35.

To effectuate these purposes, the Act contemplates that the DSIs will pay rates sufficiently high to cover BPA's cost of acquiring new resources and to subsidize the sale of low-cost power to residential customers of private utilities. The DSIs argue that the assurance of power to their first quartile was a necessary inducement for them to enter the contracts requiring them to pay significantly higher rates. We disagree. Congress provided an ample incentive for the DSIs to enter the new contracts. Many of the DSIs' prior contracts would have expired soon after the Act was passed and those DSIs would have had to pay higher rates for whatever replacement power they could find after the expiration of their contracts. H.R.Rep.No.976 (Part I), *supra,*

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equivalent amount of the DSI loads in the later periods (without provisional or advance energy being made available for this amount of the DSI load).

Id. The above-quoted sentence refers to a plan called Firm Energy Load Carrying Capability by which BPA borrows power from future years on the probability that there will be greater than critical water levels. The sentence indicates that treating the DSI load as firm means using only this plan to meet the DSIs needs. This is particularly evident in the provision that BPA need not supply the amount of power borrowed from future years if the water levels are low.

The reference to "treating the DSI load as firm in the operation" is ambiguous because the first quartile cannot be treated as firm entirely. Unlike firm power, it is interruptible and subject to priorities. If the first quartile does not have all the attributes of firm power in the context of operations, the phrase "treat as firm" does not indicate what firm attributes the first quartile has.

at 28. The primary incentive for the DSIs to enter the contracts was the long-term security they gained from the new twenty-year contracts.[8]

Although there is no case authority directly on point, *City of Santa Clara, California v. Andrus*, 572 F.2d 660 (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed. 2d 167 (1978) is instructive on the purposes and proper interpretation of a preference clause. In *Santa Clara*, the Secretary of the Interior, acting through the Bureau of Reclamation, "banked" power produced pursuant to the Reclamation Project Act of 1939 (43 U.S.C. §§ 375a, 387-89, 485 *et seq.*) with a non-preference customer instead of selling it directly to a preference customer. The Secretary argued that the arrangement was designed to enable him to supply the future needs of selected preference customers. 572 F.2d at 669. This court held that the provisional sale of power to a non-preference customer when a preference customer **[715]** is ready and willing to buy it contravened the purpose of the preference because the non-preference customer would profit from low-cost power at the expense of the preference customer. *Id.* at 670-71. Although the court recognized that the ultimate goal of the Secretary's scheme was consonant with the preference clause, it nevertheless found that the interim effect was inconsistent with the preference clause, and, therefore, held the scheme invalid.

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[8]Although we ultimately hold for the preference customers, we note that we do not find persuasive their argument that BPA's interpretation is unreasonable because it provides a disincentive for them to build new power facilities. The incentives that Congress provided preference customers for constructing power facilities are that: (1) they can receive credit on their current power bill for the cost of constructing facilities that reduce BPA's obligation to acquire resources (Act as § 6(h)); or (2) they can sell the capacity to BPA at a reasonable price while paying low federal rates for power (Act at §§ 6(a)(2), 6(i)(2), 7(b)(1)). Congress, the body authorized to do so, provided ample incentives, irrespective of the preference clause's application to nonfirm power.

The contention in the present case that the sale of nonfirm energy to DSIs serves the preference clause by creating reserves and earning revenue that can reduce the rates of all preference customers is answered by *Santa Clara*. BPA's policy may serve the preference clause, but the immediate effect, like that in *Santa Clara*, is antithetical to preference rights, and, therefore, is not consonant with the preference clause.[9] The fact that BPA's policy may enable it to profit more from selling the nonfirm energy to the DSIs and that all of its customers would thereby benefit does not persuade us that its interpretation is reasonable. As explained in *Santa Clara*, the purposes of the Act and its preference clause are best served by an interpretation that ensures the sale of power to preference customers. BPA's interpretation to the contrary, without explicit Congressional direction, contravenes the purposes of the preference clause.

CONCLUSION

[4] Congress strongly reaffirmed in the Act the long-standing preference given to public bodies in the sale of federal power. The Act contains no explicit direction from

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[9]BPA's reliance on *Volunteer Electric Cooperative v. Tennessee Valley Authority*, 139 F.Supp. 22 (E.D.Tenn.1954), *aff'd mem.*, 231 F.2d 446 (6th Cir. 1956) is misplaced. In *Volunteer*, TVA sold directly to an industrial customer instead of allowing its preference customer to serve the industry and gain the profit. The court held that TVA could serve the industry directly because the benefit would be shared by all customers, not just the one utility, and that that approach served the Act's purpose to provide low-cost power. The present case is not one in which a preference customer profits from selling power acquired through the preference to the industries who also want the power. Here, the preference customers want the low-cost power for their customers. To the extent that *Volunteer* holds that the power agency may bypass the preference if the bypass benefits all of its customers, *Volunteer* is contradicted by *Santa Clara*.

Congress to create an exception to the preference with respect to the provision of nonfirm power to DSIs. We hold that BPA's interpretation is unreasonable because it contravenes the longstanding preference explicitly continued under the Act and is without express statutory support.[10] Accordingly, we remand the matter to BPA with directions for further action consistent with this opinion.

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[10]Because we find that the priority given the DSIs for nonfirm power violates the preference provisions of the Act, we need not determine whether BPA failed to follow required procedures in adopting its interpretation of the Act.